

Supreme Court

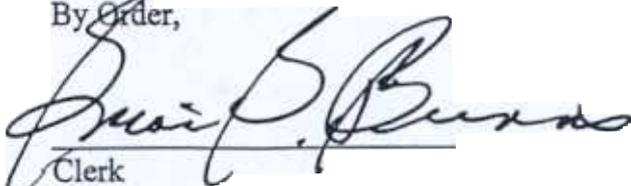
In re Report of Ad Hoc Committee to
Review Article II, Rule 9 on *Pro Hac*
Vice Admissions

ORDER

On October 3, 2001, this Court issued an Order establishing an Ad Hoc Committee to review Supreme Court Article II, Rule 9 and relevant statutes relative to *pro hac vice* attorney admissions in Rhode Island, and we directed that such committee report its recommendations to the Chief Justice no later than December 31, 2001. The Ad Hoc Committee thereafter forwarded its report and recommendations to the Chief Justice and the report was presented to the Court at its conference on January 17, 2002.

Upon consideration thereof, we hereby assign the Ad Hoc Committee's report on the subject of *pro hac vice* admissions for hearing before this Court on *Thursday, March 28, 2002*, at 9:30 a.m. Interested parties are invited to appear on that date and to address the Court on the Ad Hoc Committee's report and recommendations or on any issue related to the subject of *pro hac vice* admissions in this state. Persons interested in appearing before the Court should register with the Supreme Court clerk by *Friday, March 22, 2002*. Those desiring to submit written memoranda on the *pro hac vice* issue may do so on or before *March 18, 2002*. Copies of the Ad Hoc Committee report will be available in the Supreme Court clerk's office.

Entered as an Order of this Court this *18th* day of *January 2002*.

By Order,

Clerk

REPORT OF AD HOC COMMITTEE TO REVIEW ARTICLE II, RULE 9 ON PRO HAC VICE ADMISSIONS

I. Introduction

By order of the Rhode Island Supreme Court dated October 3, 2001, an Ad Hoc Committee was organized to review Article II, Rule 9 and relevant statutes relating to pro hac vice admission. The co-chairs of the Ad Hoc Committee are Senior Associate Supreme Court Justice Victoria Lederberg and Associate Superior Court Justice Michael A. Silverstein. The attorney members of the Ad Hoc Committee are Caroline M. Gilroy-Brown, Robert C. Corrente, Edward H. Newman, Deming E. Sherman, Walter R. Stone, Michael A. St. Pierre, Tina C. Benik, and Kathleen Managhan. The Ad Hoc Committee is required to report on its review and make recommendations to Supreme Court Chief Justice Frank J. Williams no later than December 31, 2001.

The Ad Hoc Committee held meetings on October 3, November 1, November 19, and December 7, 2001.

At the initial meeting, the Committee reviewed and discussed the materials assembled by Justice Lederberg and determined that the considerations relating to pro hac vice admission concern both transactional (i.e., non-litigation) attorneys as well as litigation attorneys. Accordingly, the Committee formed two subcommittees, one to review the rules and statutes with regard to transactional attorneys (the "Non-litigation Subcommittee"), and the other to review the rules and statutes with regard to litigation attorneys (the "Litigation Subcommittee"). The members of the Non-litigation Subcommittee are Justice Silverstein, Caroline M. Gilroy-Brown, Robert C. Corrente, Deming E. Sherman, and Tina C. Benik. The members of the Litigation Subcommittee

are Justice Lederberg, Edward H. Newman, Walter R. Stone, Michael A. St. Pierre, and Kathleen Managhan.

The Non-litigation Subcommittee met on October 22, 2001 and November 5, 2001. This Subcommittee considered two matters: (a) non-litigation legal practice in Rhode Island by in-house counsel who are not members of the Rhode Island bar, and (b) non-litigation legal practice by out-of-state attorneys in Rhode Island who are not in-house counsel. As a result of the review by this Subcommittee, the Ad Hoc Committee is making a formal recommendation with regard to in-house counsel, as discussed in Section II below, and further is recommending that consideration of issues relating to multi-state practice be deferred until the American Bar Association's related recommendation is considered next year, as discussed in Section IV below.

The Litigation Subcommittee met on October 22, 2001. The matters considered at those meetings are discussed in Section III below.

II. In-House Counsel

As a preliminary matter, the Committee notes the distinction between "house counsel" and "in-house counsel." House counsel typically is a practitioner who maintains a law practice independent of his or her client but practices from the client's office site, and the client typically is the practitioner's only client. In-house counsel, by contrast, is an employee of the client and does not maintain an independent law practice. Typically, in-house counsel are required by their employers to be admitted to practice law in a state, though not necessarily the state in which the in-house counsel's office is located. The Committee notes that "house counsel" practice law as do lawyers in private

practice, and therefore are subject to all requirements applicable to members of the bar. The Committee therefore focused on “in-house counsel.”

There are several countervailing issues relating to in-house counsel. On the one hand, the imposition of a requirement that in-house counsel sit for the Rhode Island bar examination may be a disincentive to out-of-state attorneys to apply for in-house counsel positions with Rhode Island-based companies. On the other hand, attorneys should be accountable to their clients and the Court, and mandatory continuing legal education requirements serve to ensure a minimum level of competence of practitioners.

In balancing those considerations, the Committee recommends that practitioners employed in Rhode Island as in-house counsel and who are not already admitted to practice law in Rhode Island be required to register annually as an “in-house counsel” with, and pay an annual registration fee in an amount determined by, the Supreme Court. In order to qualify for such registration, the Committee recommends that such individual must actually be employed in Rhode Island as in-house counsel, not maintain an office or law practice apart from the employer company,¹ and be admitted to practice law in a state of the United States or the District of Columbia and retain such admission in good standing. Registrants also would be subject to ethics rules and disciplinary procedures to the same extent as members of the bar, and be required to comply with all mandatory continuing legal education requirements.

Moreover, the Committee recommends that a registrant should not be considered a member of the Rhode Island bar. The registrant thus would be precluded from

¹ The Committee’s recommendation also recognizes the business reality that in-house counsel may be counsel to his or her employing entity, as well as counsel to such entity’s commonly owned or controlled organizational affiliates.

representing his or her employer in a proceeding (i.e., before a court or an administrative agency or in a municipal proceeding) that is or is reasonably expected to be a contested case, unless the registrant also is admitted pro hac vice under Article II, Rule 9 and any provisional orders or rules of the Supreme Court or other courts.

To implement these recommendations, the Committee recommends that amendments be made to Article II, Rule 9 and Article IV, Rule 1 of the Rhode Island Supreme Court Rules and to R.I. Gen. Laws § 11-27-5, as set forth in Appendix A hereto.

III. Pro Hac Vice Admissions

As the practice of law becomes increasingly regional and national in scope, there will be more non-Rhode Island lawyers seeking admission to litigate cases in Rhode Island, both in the federal and state courts. In the United States District Court for the District of Rhode Island, for example, more than half of the cases involve pro hac vice admissions. Similarly, there will be more Rhode Island lawyers seeking admission pro hac vice in cases outside of Rhode Island. The Committee recommends that the procedures adopted by the Supreme Court should be uniform and consistent with - and not more onerous than - those of other states.

Presently, the only state court other than the Supreme Court that has specific authority to grant pro hac vice admissions is the Superior Court in criminal cases (Super. Ct. R. Crim. P. 50). The Committee recommends that the authority to grant pro hac vice admissions should be delegated generally to the courts in which the attorneys will practice. This is consistent with prior practice and will relieve the Supreme Court of the administrative burden of reviewing and passing on all motions for admission pro hac vice. Accordingly, the proposed amendment to Article II, Rule 9, as set forth in

Appendix B, would clarify procedures for admission and delegate the authority to the superior, family, district and workers' compensation courts for admission pro hac vice in those courts. Attorneys seeking admission pro hac vice in matters before probate courts, state and municipal commissions, boards or agencies would apply to the court to which an appeal from that body is taken.

The Committee recommends the adoption of a Superior Court rule that provides for admission in civil cases, as set forth in Appendix C. The Committee also recommends that other courts adopt a similar rule, as set forth in Appendix D.

The Committee recommends that in mass tort litigation, the superior court should be given authority to allow pro hac vice admissions on more frequent occasions than Rule 9(a) would permit otherwise.

Some members of the Committee believe that the power should also be delegated to certain state commissions, boards or agencies where the practice of law is more specialized and where it is common for out-of-state counsel to appear on behalf of clients. These would include the public utilities commission, the department of environmental management and the department of business regulation.

Fees

The Committee believes that the current fee of \$150 per pro hac vice motion is unreasonable because it is not cost-related and is unduly restrictive. It also is out of line with federal court practice and practice in many other states. For example, the fee in the United States District Court for Rhode Island is \$50, and there are no fees in the state courts of Massachusetts and Connecticut. The Committee recommends that no fee be charged for a pro hac vice motion unless a new court file must be opened in which case

the fee shall be no more than \$50 per attorney to cover administrative costs for each motion.

Uniform Motion

The Committee recommends that the Court adopt a uniform motion for admission pro hac vice, as set forth in Appendix E.

Certification by the Client

The Committee believes that a client should know when the client's attorney applies for admission pro hac vice in Rhode Island and should understand the consequences thereof, including the fact that local counsel under certain circumstances may be required to assume all responsibility for the case or matter, including the conduct of the trial. Most members of the Committee believe that the client should sign a certification in support of the motion for admission pro hac vice. Some members believe that it is sufficient that the attorney counsel the client consistent with usual ethical practices and that a separate certification form should not be required.

A client certification form is set forth in Appendix F.

IV. Multi-State Practice

The Committee considered whether to make any recommendations relating to the practice of law in Rhode Island by non-Rhode Island attorneys who engage in transactions or legal counseling that are neither litigation nor proceedings before state or local courts, boards, commissions or agencies where admission pro hac vice is appropriate. The Committee recommends that no action be taken at this time for the following reasons:

The American Bar Association has established a commission to consider the multi-state practice of law and to make recommendations for amending the Rules of Professional Conduct. In May 2001, the ABA Ethics Committee issued its recommendation to revise the Rules of Professional Conduct in the form of a new ABA Model Rule 5.5. See Appendix G, including the commentary to the proposed rule. The proposed new rule provides safe harbors for lawyers not admitted to the local jurisdiction in three instances (in addition to obtaining admission to practice pro hac vice): where the lawyer is an in-house counsel, where a transaction arises out of the lawyer's representation in a jurisdiction where the lawyer is admitted, and where a lawyer associates with a lawyer admitted to practice in a jurisdiction who actively participates in the matter. In these instances, the lawyer would not be engaged in the unauthorized practice of law.

Model Rule 5.5, along with other related changes to the Model Rules, is presently under consideration by the ABA House of Delegates, and we anticipate that there will be action on the rule in 2002. We recommend that action by this Court be deferred until the ABA has adopted or rejected these proposals.

December 26, 2001

Draft Amendments to Art. II, Rule 9, Art. IV, Rule 1,
and R.I. Gen. Laws § 11-27-5

(in-house counsel)

I. Art. II, Rule 9 (amendments in italics)

Rule 9. Nonresident attorneys - *In-house counsel* - Senior law students. – (a) Any attorney . . . foreign jurisdiction.

(b) Registration of In-house Counsel. An attorney who is employed by a corporation or other entity at an office in this state, and who is a member in good standing of the bar of any other state but is not a member of the bar of this state, shall register with the supreme court as an "in-house counsel." An in-house counsel shall be subject to Articles III (Disciplinary Procedures), IV (Periodic Registration of Attorneys and Mandatory Continuing Legal Education Regulations) and V (Rules of Professional Conduct) of these rules. An in-house counsel shall be permitted to practice law in this state on behalf of the corporation or other entity by which the in-house counsel is employed, its directors, officers and employees in their respective official or employment capacities, and/or its commonly owned or controlled organizational affiliates, except that an in-house counsel shall not appear in the courts of this state, and shall not appear in any agency or municipal proceeding that the attorney has reason to believe prior to the proceeding is contested unless the attorney is admitted pro hac vice pursuant to subsection (a) and any provisional orders of the supreme court.

Subsections under "Senior law students" shall begin with (c) and end with (h), and internal subsection references also shall be amended to reflect the new subsection (b).

Draft Amendments to Art. II, Rule 9

(admission pro hac vice)

I. Art. II, Rule 9 (amendments in italics)

Rule 9. Nonresident attorneys – *In-house counsel* - Senior law students. – (a) Any attorney who is a member in good standing of the bar of any other state, not residing in this state, may, upon special and infrequent occasion and for good cause shown upon written motion presented by a member of the bar of this state, be permitted in the discretion of *this court or such other court to which authority is delegated* to participate to such an extent as the court may prescribe in the presentation of a cause or appeal in *this or any court, tribunal, commission, board or agency in this state* ~~if such other state grants like privileges to members of the bar, in good standing, of this state~~; provided, however, that a member of the bar of this state must sign all pleadings, briefs and other papers filed with the court, *tribunal, commission, board or agency*, and assume full responsibility for them and for the conduct of the cause and of the attorney to whom such privilege is accorded. . . .

The following courts are delegated the authority to permit nonresident attorneys to participate in causes or appeals before them subject to the provisions of this rule: the superior court, the family court, the district court and the workers' compensation court. Nonresident attorneys who seek permission to participate before a state tribunal, commission, board or agency, or municipal court, commission, board or agency shall file a motion for admission pro hac vice before the court to which an appeal is taken from that court, tribunal, commission, board or agency.

The presiding justice of the superior court, or his or her designee, shall have the authority to grant pro hac vice admissions on frequent occasions in mass tort litigation.

Note: The courts to which the power is delegated should each adopt an administrative rule to provide for the handling of pro hac vice motions.

Rule for Pro Hac Vice Admission in a Civil Case

(corresponding to Rule 50(c) of the Superior Court Rules of Criminal Procedure)

Out of State Counsel. No person, who is not an attorney and counsellor of the Supreme Court of the State of Rhode Island, shall be permitted to act as attorney or counsellor for any party in any proceeding, hearing or trial in the Superior Court unless granted leave to do so by the Superior Court. Unless the Superior Court permits otherwise, any attorney who is granted such leave to practice before the Superior Court shall not engage in any proceeding, hearing or trial therein unless there is present in the courtroom for the duration of the proceeding, hearing or trial a member of the bar of Rhode Island who shall be prepared to continue with the proceeding, hearing or trial in the absence of counsel who has been so granted leave.

Leave shall be granted by the Superior Court in its discretion upon motion in the form approved by the court, signed by the movant and assented to by the party being represented and by Rhode Island associate counsel.

Rule for Pro Hac Vice Admission

Out of State Counsel. No person, who is not an attorney and counsellor of the Supreme Court of the State of Rhode Island, shall be permitted to act as attorney or counsellor for any party in any proceeding, hearing or trial in the [] Court unless granted leave to do so by the Superior Court. Unless the [] Court permits otherwise, any attorney who is granted such leave to practice before the [] Court shall not engage in any proceeding, hearing or trial therein unless there is present in the courtroom for the duration of the proceeding, hearing or trial a member of the bar of Rhode Island who shall be prepared to continue with the proceeding, hearing or trial in the absence of counsel who has been so granted leave.

Leave shall be granted by the [] Court in its discretion upon motion in the form approved by the court, signed by the movant and assented to by the party being represented and by Rhode Island associate counsel.

vs.

C.A. No.

MOTION FOR ADMISSION PRO HAC VICE

[Movant] _____ hereby moves that _____
be admitted pro hac vice in the above-case/agency proceeding as associate trial counsel with
local associate counsel identified below, on the following grounds [Please check appropriate
grounds and provide specifics]:

- The case/agency proceeding involves the following complex areas of the law, in which pro hac vice counsel concentrates:

- Pro hac vice counsel's long-standing representation of the client:

- The local trial bar lacks experience in the field of:

- The case/agency proceeding involves complex legal questions under the law of a foreign jurisdiction with which pro hac vice counsel is familiar, specifically:

- The case/agency proceeding requires extensive discovery in a foreign jurisdiction convenient to pro hac vice counsel, as follows:

- It is a criminal case, and pro hac vice counsel is Defendant's counsel of choice.

- Other: _____

vs.

C.A. No.

ATTORNEY CERTIFICATION FOR PRO HAC VICE ADMISSION

1. I certify that I am a member in good standing of the bar of the State(s) of _____, without any restriction on my eligibility to practice, and that I understand my obligation to notify this Court immediately of any change respecting my status in this respect.

2. I am currently admitted, and/or within the preceding 60 months have applied to be admitted, in the following cases in this State:

3. I have read, acknowledge, and agree to observe and to be bound by the local rules and orders of this Court, including the Rules of Professional Conduct of the Rhode Island Supreme Court, as the standard of conduct for all attorneys appearing before it.

4. I acknowledge that if specially admitted to appear in the above-entitled matter that I will be subject to the disciplinary procedures of the Rhode Island Supreme Court. I hereby authorize the disciplinary authorities of the bar of the State(s) of _____ to release any information concerning my practice in said State(s) pursuant to the request of the Disciplinary Counsel of the Rhode Island Supreme Court.

5. For purposes of this case I have associated with local associate counsel identified below, and have read, acknowledge, and will observe the requirements of this Court respecting the participation of local associate counsel, recognizing that failure to do so may result in my being disqualified, either upon the Court's motion or motion of other parties in the case.

I hereby represent that I am a member in good standing of the bar of the State of Rhode Island and that I am actively engaged in the practice of law out of an office located in this state.

Attorney for _____

DATED: _____

Pro Hac Vice Counsel

CERTIFICATE OF SERVICE

I, _____, hereby certify that a true copy of the within Motion for Admission Pro Hac Vice with accompanying Attorney and Client Certifications were sent postage pre-paid to _____ on this _____ day of _____, A.D.,

CLIENT CERTIFICATION

I, _____, certify that:

1. I am the plaintiff/defendant or an authorized representative of a corporate or business entity which is the plaintiff/defendant in this case;

2. I am aware that Attorney _____ is not a member of the Rhode Island bar, but that he/she has applied for permission to appear in this case on my behalf;

3. I am also aware that, if Attorney _____ is permitted to appear in this case, I will also be required to engage as co-counsel and pay for the services of a lawyer who is a member of the Rhode Island bar;

4. I am also aware that the Rhode Island lawyer engaged must be fully prepared to assume complete responsibility for the case at any time, and may be required to conduct the trial/hearing/appeal in this case on my behalf (or on behalf of the corporate or business entity);

5. Having been advised of the matters set forth above, I support the request of Attorney _____ to be permitted to appear in this case on my behalf (or on behalf of the corporate or business entity), in accordance with the rules of this Court and of the Supreme Court of the State of Rhode Island.

WITNESS

SIGNATURE

PRINT NAME

DATE

Signature

Name

Firm Name

Business Address

I certify that I have read and join in the foregoing Certification, and acknowledge and agree to observe the requirements of this Court as related to the participation and responsibilities of local associate counsel.

Signature

Local Associate Counsel

R.I. Bar ID #

Firm Name

Business Address